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STATE OF WASHINGTON
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIVISION II

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FUTUREWISE; EVERGREEN ISLANDS; and SKAGIT AUDUBON
SOCIETY,

Petitioners,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, an agency of the State of Washington; and CITY OF
ANACORTES,

Respondents,

and

WASHINGTON PUBLIC PORTS ASSOCIATION, et al.,

Intervenors.

REPLY BRIEF OF INTERVENOR-APPELLANT WPPA

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ORIGINAL

I. INTRODUCTION

Intervenor-Appellant Washington Public Ports Association (the "WPPA") respectfully offers this brief in reply to Respondents Futurwise, Evergreen Islands, and Skagit Audubon Society's ("Futurewise") and the Intervenor-Respondents Washington State Department of Community Trade, and Economic Development and the Washington State Department of Ecology's (the "State") briefs in opposition (collectively the "Respondents").

The core issue in this litigation remains the proper interpretation of ESHB 1933. Specifically, the key issue is the timing of ESHB 1933's transfer of jurisdiction over shoreline areas from the Growth Management Act ("GMA") to the Shoreline Management Act ("SMA"). The Western Washington Growth Management Hearings Board ("Board") concluded that ESHB 1933 effected a prospective transfer of jurisdiction; protections of the GMA critical area ordinances continue to apply in the interim, but any new regulation of critical areas in the shoreline must be governed by the SMA and the Shoreline Guidelines. The Board's interpretation was driven by the express statement of intent in ESHB 1933:

The legislature intends that critical areas with the jurisdiction of the shoreline management act shall be governed by the shoreline management act and that critical areas outside the jurisdiction of the shoreline management act shall be governed by the GMA.

ESHB 1933 section 1(3). Applying this holding, the Board rejected a GMA critical area ordinance within the Shoreline area by the City of Anacortes (the “City”), concluding that this new regulation in the shoreline must be governed by the SMA, and that the City failed to follow proper SMA procedures.

The Respondents in their response briefs bring forward a number of challenges to the Board’s interpretation of ESHB 1933. Principally, the Respondents urge that ESHB 1933 should be interpreted to delay transfer of jurisdiction from the GMA to the SMA for several years until the local jurisdictions are required to update their entire shoreline master program. To support their position, the Respondents cite to a schedule in a different piece of legislation, not referenced by ESHB 1933, and continue to allege that earlier application of this provision will lead to a regulatory “gap.” As discussed below, the Respondents’ positions are not supported by the language of the statute, the clear legislative expression of intent, or the circumstances surrounding the passage of ESHB 1933. Collectively, they have failed to demonstrate that the Board’s interpretation is not plausible

or otherwise contrary to legislative intent, and this Court should uphold the decision of the Board.¹

II. ARGUMENT

A. The Court May Consider Legislative Intent and History

The Respondents both contend that ESHB 1933 is not ambiguous, and therefore the Court need only look to the plain words of the statute to determine the legislature's intent. *See* State Brief at 20. Despite, their assertion that the meaning of ESHB 1933 "is clear and unambiguous," the Respondents provide no textual basis for determining the timing of the effectiveness of the provision. The statute provides only that jurisdiction is transferred "[a]s of the date the department of ecology approves a local government's shoreline master program adopted under applicable shoreline guidelines." The statute provides no unambiguous dates, does not specify the nature of the required approval, nor explain which shoreline guidelines are, in fact, "applicable."² By failing to provide specific dates, or cross reference other portions of the code, the statute is susceptible to more than one reasonable interpretation, and the Court may

¹ *See Pitts v. State, Dep't of Soc. & Health Servs.*, 129 Wn. App. 513, 523, 119 P.3d 896 (2005); *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996).

² In fact, the Respondents are only able to show that the reference to the "applicable" shoreline guidelines means the 2003 Guidelines by reference to extra statutory evidence. *See* State Brief at 21-22 (referencing administrative history of guidelines).

properly resort to tools of statutory construction and legislative history.

Tingey v. Haisch, 159 Wash. 2d 652, 657 (2007).

B. The Board Did Not Rule That the Application of ESHB 1933 Was “Immediate”

Respondents collectively overstate the holding of the Board in its interpretation of ESHB 1933. The Board’s interpretation of ESHB 1933 consists of two key rulings:

- ESHB 1933 applies prospectively, therefore new regulations of critical areas in shorelines must be reviewed under the SMA and the Shoreline Guidelines, rather than under the GMA.³
- ESHB 1933 does not apply retroactively, therefore GMA critical area ordinance protections continue to apply until the shoreline master program is updated.⁴

In addition, the Western Board’s ruling provides ongoing protection for shoreline critical areas under existing GMA ordinances pending local governments’ updates for their shoreline plans.

The Board did not conclude that application of ESHB 1933 was “immediate” as the Respondent’s contend. On the contrary, the Board concluded that the GMA would continue to govern critical areas within the shorelines *until* there was an attempt to amend those critical areas ordinances. *See* Final Decision and Order at 27 (AR 00850). The board concluded that any new attempt to amend shoreline regulations following

³ Final Decision and Order at 27:9-24, AR 000850.

⁴ *Id.* at 26-32.

ESHB 1933, regardless of how they were labeled, must comply with the requirement of the SMA. *Id.* Local governments could enact new shoreline regulations by complete shoreline master program updates, or by amending a segment of the master program. *Id.* To hold otherwise, the Board concluded, would deny the legislative intent to transfer jurisdiction over the shoreline areas until at least 2011. *Id.*

In short, the Board concluded that ESHB 1933 applied prospectively, but that application need not wait to 2011 or later. Rather, based on expressed intent to transfer jurisdiction over shoreline areas to the SMA the Board concluded that the jurisdictional provisions of ESHB 1933 were triggered by any update or amendment to regulations in the shoreline. Absent such an interpretation, a local government could effectively defeat the legislature's intent to transfer jurisdiction in the intervening years leading up to 2011 by making amendments to regulations pertaining to shoreline critical areas under the guise of the GMA critical area ordinances rather than SMA segment amendments provided in ESHB 1933.

The Board's position is well reasoned, and supported by the language of the act and its legislative history. Given that it took the legislature only four months to overrule the Central Board's decision in *Everett*, it seems doubtful that the legislature intended to wait several additional years before any transfer to the SMA occurred.

C. SSB 6012 Does Not Provide the Effective Dates of ESHB 1933

Both Futerwise and the State rely heavily on the legislature's adoption of SSB 6012 to support their conclusion that the legislature unambiguously intended to delay the application of ESHB 1933 for several years. SSB 6012 sets a series of deadlines by which date local jurisdictions must update their shoreline master programs. SSB 6012 does not cross reference the transfer provisions of ESHB 1933, nor vice versa. Despite the lack of any textual connection, Respondents urge that SSB 6012 provides the proper implementation schedule for ESHB 1933, ostensibly based on the coincidence that the two measures were passed in the same day.

The Board noted and rejected the application of the schedule provided in SSB 6012. The Board rejected the applicability of this schedule to ESHB 1933 because it would result in a delay of as much as ten years between the passage of ESHB 1933 and the transfer of jurisdiction to the SMA. *See* Final Decision and Order at 27 (AR 00850). Because such delay is inconsistent with the clear intent of the legislature, the Board properly rejected its application.

D. The Board's Interpretation Does Not "Mandate" Early Updates for Shoreline Master Programs

Both Respondents argue that the Board's decision will require local governments to use the optional provisions of SSB 6012 to update

their shoreline master programs ahead of the required schedule. The Respondent's argue that this early update is mandated because local jurisdictions are under a separate duty to update and revise their comprehensive plans and critical area ordinances under the GMA. In order to comply with this GMA mandate, Respondents argue they would have to both update their critical area ordinances and their SMA master program at the same time or be found in violation of the GMA deadline. *See Futurewise Brief at 18.*

Respondents do not explain why a local jurisdiction may not update the critical area regulations that apply outside of the shoreline area now, and update regulations within the shoreline jurisdiction later. The Respondents' "mandate" argument ignores an essential result of ESHB 1933 (and the Board's interpretation): that going forward regulations to protect shoreline critical areas are no longer subject to the requirements of the GMA nor subject to appeal to the growth boards on the grounds of noncompliance with the GMA. Thus, the local jurisdiction may wait for the SSB 6012 deadline before making any changes. If, however, local jurisdictions *choose* to update regulation in the shoreline areas, they must do so according to the requirements of the SMA.

E. The Board's Interpretation Does Not Lead to a Regulatory Gap

Futurewise continues to argue that there may be no local protective regulations in place during the period when Ecology is reviewing a shoreline amendment. *See* Futurewise Brief at 17. As discussed previously, the Board's ruling leaves in place the protections of the GMA pending any new shoreline amendment. Moreover, the answer to this hypothetical problem is simple; a local government should not repeal any regulations that protect its shorelines (either those from its original SMP, or those in its GMA critical areas ordinance) until Ecology approves the local government's amendment to its Shoreline Master Program. To the extent that something different happened in this case, it resulted because the Western Board had not yet given clear guidance on how local governments must proceed. Local governments that follow the Western Board's ruling in the future will not have a gap in protection.

III. CONCLUSION

The Board's interpretation of ESHB 1933 was well reasoned and consistent with the express language and legislative intent. The Court should reverse the decision of the Superior Court and re-instate the decision of the Board.

RESPECTFULLY SUBMITTED this 15th day of June, 2007.



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Declaration of Service

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

STATE OF WASHINGTON
By ym
DEPUTY

Washington that the following is true and correct:

That I am a citizen of the United States, a resident of the State of Washington, and over the age of eighteen years, not a party to the above-entitled action and competent to be a witness therein;

That on the 13th day of June, I caused the following document to be served on the persons and organizations listed below in the manner and on the date shown:

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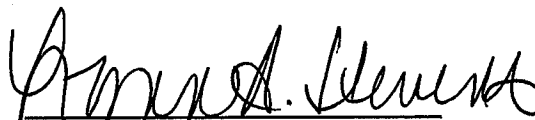
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

SIGNED on June 13, 2007 at Seattle, Washington.


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